NO. 82-1253

IN THE

Supreme Court of the United States

October Term, 1983

HERMAN SOLEM, *et al.*,
Petitioners,

v.

JOHN BARTLETT,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COUNTIES OF DUCHESNE AND UINTAH, UTAH; COUNTIES OF MOUNTRAIL, WARD, AND MCLEAN, NORTH DAKOTA; LAKE COUNTY, MONTANA; MAHNOMEN COUNTY, MINNESOTA; AND THE TOWNS OF HOBART AND ONEIDA, WISCONSIN, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI

Commencing in the early 1970's, judicial decisions in favor of Indian tribes have resurrected the reservation status of a number of areas which were originally Indian reservations but which were thought to have been disestablished by congressional enactment long ago. Despite the several decisions of this Court which were intended to clarify the matter, confusion in this area of the law persists, and the lower courts continue to find that historic reservation areas still exist despite persuasive evidence to the contrary. The Counties and Towns joining in this brief all contain areas that were at one time established as Indian reservations. The question of whether these historic reservations continue to exist today is of considerable importance to the Amici, since reservation status significantly affects the extent to which a state and its local subdivisions may exercise governmental

authority within those areas. See, e.g., DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Thus, the principles and guidelines used by the courts, particularly this Court, are of paramount concern to the Amici Towns and Counties. The specific concerns and interests of the various Amici are separately discussed below.

The Utah Counties:

The Counties of Duchesne and Uintah are presently involved in litigation over the two historic Indian reservation areas located within their boundaries. Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981), appeals pending, Nos. 81-1827 & 81-1901 (10th Cir.). They are: the original Uintah Indian Reservation established by Executive Order of October 3, 1861 (I Kappler 900) and the Act of May 5, 1864 (13 Stat. 63); and, the original Uncompahgre Indian Reservation established by Executive Order of January 5, 1882 (I Kappler 901). Both these historic

reservations were allotted and opened to entry pursuant to surplus land acts enacted in the late 1800's or early 1900's. By Presidential Proclamation of July 14, 1905 (34 Stat. 3119), it was proclaimed that, pursuant to the surplus land act of May 27, 1902 (32 Stat. 245, 263) and amendments thereto, the unallotted and unreserved lands of the historic Uintah Reservation were to be opened for public entry and settlement. See, e.g., Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 22 (1957). And, pursuant to the Act of June 7, 1897 (30 Stat. 62, 87), the unallotted lands of the Uncompahgre Reservation were opened to public entry. See, e.g., [1911] Report of the Commissioner of Indian Affairs at 92. Subsequent to the opening of these reservation areas, only the lands which were reserved from the opening for the Ute Tribe, along with the lands subsequently restored to tribal ownership and reservation status (see 10 Fed. Reg. 12409;

62 Stat. 72), were, until recent years, treated as that Tribe's existing reservation.

The boundary dispute involving the two historic Ute reservations is similar, in several crucial respects, to the case before this Court: restoration to public domain language plays a prominent role in each case; and, important aspects of the subsequent administrative and legislative treatment of the two historic reservations substantially parallel those of the opened area at issue here. As a result, the resolution of this case is particularly important for Duchesne and Uintah Counties because the Court may well address matters which could have a direct and significant impact upon their boundary dispute.

The North Dakota Counties:

Within the Counties of Mountrail, Ward, and McLean is located the original Fort Berthold Indian Reservation as established by the Act of March 3, 1891 (26 Stat. 1032). The status of this historic reservation was

the subject of the decision in City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972) -- a decision which antedates both DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In 1979, the Eighth Circuit expressly "adhere[d]" to its opinion in New Town without conducting an independent reexamination of the surplus land act involved in that decision. See United States v. Dupris, 612 F.2d 319, 323 (8th Cir. 1979), vacated mem. 446 U.S. 980 (1980).

Pursuant to the Act of June 1, 1910 (36 Stat. 455), the unallotted and unreserved lands of the original Fort Berthold Reservation lying east and north of the Missouri River (which roughly traverses the reservation diagonally from northwest to southeast) were opened to public entry. See 37 Stat. 1693; 39 Stat. 1748. Thereafter, until the early 1970's, the opened lands were

understood and treated as having been disestablished. See New Town, 454 F.2d at 123. The 1910 surplus land act is very much like the act at issue in this case. In particular, like the 1908 Cheyenne River Act, it has: (1) a "sell and dispose" provision (§ 1, 36 Stat., at 455); (2) a school lands provision (§ 8, 36 Stat., at 457); and (3) a prohibition against the introduction of intoxicants provision (§ 13, 36 Stat., at 458). In addition, several important aspects of the subsequent administrative and legislative treatment of the opened portion of the original Fort Berthold Reservation substantially parallel those present in the instant case. Hence, the resolution of this case will likely have an important bearing on any future litigation which might arise in regard to the reservation status of the opened portion of the original Fort Berthold Reservation.

The Montana County:

A substantial portion of Lake County, Montana, is included within the original Flathead Indian Reservation as established by treaty in 1855 (12 Stat. 975). The status of this historic reservation was the subject of the decision in Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied sub nom. City of Polson, Montana v. Confederated Salish and Kootenai Tribes, ____ U.S. ____, 103 S. Ct. 314 (1982). Pursuant to the Act of April 23, 1904 (33 Stat. 302), as amended, the unallotted and unreserved lands of the original Flathead Reservation were opened for entry and settlement in 1910. See 36 Stat. 2494. thereafter, the State and local governments exercised unquestioned jurisdiction over the opened and unrestored portions of that area

for some forty years.[1] See, e.g., Pet. for Writ of Cert. at 20-21, 28, City of Polson, Montana v. Confederated Salish and Kootenai Tribes, Sup. Ct. No. 81-2406. The 1904 Flathead Act, as amended, is identical to the 1908 Cheyenne River Act in two crucial respects. It has both a school lands provision (§ 8, 33 Stat., at 303-04) and a prohibition against the introduction of intoxicants provision which was added by subsequent amendment in 1909 (§ 21, 35 Stat. 781, 795-96). Moreover, there are important similarities between the subsequent administrative and legislative treatment of the original Flathead Reservation and that present in the instant case. See, e.g., Pet. for Writ of Cert., supra, at 21-22, 28-30. Obviously then,

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1. Under Public Law 280, the State of Montana assumed full criminal jurisdiction and some civil jurisdiction over all Indian country within the original Flathead Reservation in 1965. See, e.g., Pet. for Writ of Cert. at 6 n.2, City of Polson, Montana v. Confederated Salish and Kootenai Tribes, Sup. Ct. No. 81-2406.

Lake County is joining herein because the resolution of this case could have a significant effect on any future litigation which implicates the reservation status of the opened portion of the original Flathead Reservation.

The Minnesota County:

Mahnomen County is located within the original White Earth Reservation as established by the Treaty of March 19, 1867 (16 Stat. 719). The status of this historic reservation was the subject of the decisions in White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (8th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 489 (1982), and State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980). In 1889, title to those lands of the original White Earth Reservation not necessary for allotments was ceded by the White Earth Indians to the United States under the Act of January 14, 1889 (25 Stat. 642); most all of the

remainder of the Reservation was subsequently allotted under § 3 of the Act. See, e.g., H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 34-37 (1890); Department of the Interior - Office of Indian Affairs, General Data Concerning Indian Reservations 6 (1929). After formal approval of the cession agreement in 1890 (see H.R. Exec. Doc. No. 247, at 1-2), the State had, until recent years, continuously exercised full governmental authority within the original reservation, except on tribal and allotted trust lands.[2]

In State v. Clark, it was held that the original White Earth Reservation was not

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2. Under Public Law 280, the State of Minnesota was given civil and criminal jurisdiction over all Indian country within the State except within the present Red Lake Reservation. See, e.g., 18 U.S.C. § 1162; 28 U.S.C. § 1360.

disestablished by the 1889 surplus land act.[3] In so holding, the Minnesota Supreme Court relied heavily on a U.S. District Court decision antedating Rosebud and DeCoteau -- Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971). Thus, the Amici Counties' primary concern is the significance of DeCoteau and Rosebud in relation to the continued viability of earlier boundary decisions -- a problem which is presented here as the decision under review is ultimately based upon a pre-DeCoteau and Rosebud decision. See discussion, infra at Sec. IA. Hence, Mahnomen County is joining in this brief in order to ensure that the role they believe Rosebud and DeCoteau play in this regard is fully presented to the Court.

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3. In White Earth Band of Chippewa Indians v. Alexander, Mahnomen and the other affected counties were found to be collaterally estopped from relitigating the disestablishment issue decided in Clark. White Earth Band, 683 F.2d at 1133-35.

The Wisconsin Towns:

Lastly, the Towns of Hobart and Oneida, Wisconsin, have a general interest in cases of this type. Like a great many local governments in the West and Midwest, the Towns administer areas which were at one time Indian reservations but whose lands lost their tribal character as a result of federal actions taken pursuant to the allotment policy of the late nineteenth and early twentieth centuries. Both Towns are located within the original Oneida Indian Reservation as established by Treaty of February 3, 1838 (7 Stat. 566). During the late 1800's and early 1900's, virtually all of the lands of that historic reservation were allotted and patented in fee simple under the 1887 General Allotment Act (24 Stat. 388) and the Act of June 23, 1906 (34 Stat. 325, 280-81). After that, the original reservation had been regarded by all concerned as having been disestablished, and the State and local governments have exercised

full governmental authority within that area, except on tribal trust and allotted lands. Recently, however, the suggestion has been made, based on dicta in the judicial decisions of recent years, that the historic Oneida Reservation still exists and consequently, the Towns' jurisdiction is limited.[4]

The Towns are most concerned with the alarming trend in recent decisions to ignore the federal policies which prevailed during the period in question (viz., assimilation of the Indian population and reduction of the existing reservation areas), and to resurrect the boundaries of Indian reservation areas thought to have been disestablished long ago. They therefore join in this brief in order to insure that the historical perspective is fully presented and to urge that the Court

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4. Under Public Law 280, the State of Wisconsin was granted civil and criminal jurisdiction over all Indian country within its borders. See 18 U.S.C. § 1162; 28 U.S.C. § 1360.

avoid any dicta which may encourage lower courts to find that historic Indian reservation areas still exist in the face of historical evidence to the contrary.

SUMMARY OF ARGUMENT

The Amici do not intend to track all aspects of the disestablishment case presented here. The briefs of the Petitioners and the Amici Counties of Dewey, South Dakota et al., fairly address the merits of the case in its entirety, and the Amici fully concur in the views expressed therein. The Amici are writing separately here for the purpose of highlighting those aspects of this case similar or identical to their situation which merit especial treatment. Specifically, discussion will be had as to the importance of Rosebud and DeCoteau in this context generally, and the significance which should be attributed the following matters in the disestablishment analysis: the prevailing federal policies of the era; the presence of

public domain language; certain crucial aspects of the subsequent administrative and legislative treatment including restoration of opened but undisposed of lands to tribal ownership and reservation status under the 1934 Indian Reorganization Act (48 Stat. 984); and continued federal presence in the opened area in question. The Amici believe that the role these matters play were not fully explored in the disestablishment cases previously presented to this Court or in the other briefs submitted in this case. We, of course, recognize that under the prevailing analysis, each case must be decided on its facts. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). Nevertheless, it is important to develop the common threads between the numerous surplus land acts enacted in the late 1800's and early 1900's (see National Indian Law Library, Compilation of Allotment/Cession Statutes, Cat. No. 002279),

in order to enable the Court to make an informed decision, and, at the same time, provide useful guidance for similar cases which may arise in the future.

ARGUMENT

I. THE PURPOSE UNDERLYING THE 1908 SURPLUS LAND ACT AT ISSUE WAS UNQUESTIONABLY THAT OF DISESTABLISHMENT

The Amici agree with the Petitioners that the underlying purpose of the Act of May 29, 1908, 35 Stat. 460, was to disestablish those portions of the Cheyenne River Reservation (and, by necessary implication, the Standing Rock Reservation) opened to entry and settlement under that Act. The principles which govern the analysis in this context are well established (see, e.g., Rosebud, 430 U.S. at 586-87; DeCoteau, 420 U.S. at 444); and, therefore, need not be repeated here. Suffice it to say that the focal point of inquiry is, as in any case involving the interpretation of federal legislation, congressional intent.

See Rosebud Sioux Tribe v. Kneip at 586; DeCoteau v. District County Court at 444.

A. Rosebud and DeCoteau Represent a Significant Departure from the Court's Previous Decisions in the Disestablishment Context.

Although several other cases are cited, it is fair to say that the decision of the lower court ultimately rests upon United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), as that is the only case in which the effect of the 1908 Act at issue was independently examined. See 691 F.2d 420 at 421. As that case predates Rosebud and DeCoteau, and relies upon narrow and outdated principles, the Amici believe that Erickson cannot be considered persuasive precedent. Because of the importance DeCoteau and Rosebud play here, it would be worthwhile to examine the evolution of the Court's decisions in this context.

The Court's treatment of the disestablishment question in recent years begins with Seymour v. Superintendent, 368 U.S. 351

(1962). At issue in that case was a 1906 Act which opened up the surplus lands of the southern part of the Colville Indian Reservation for entry and settlement. The Court held that since express language of termination was not used, that Act was not intended by Congress to disestablish the area affected:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act [which terminated the northern half of the Reservation] expressly vacating the South Half of the reservation and restoring that land to the public domain. Quite the contrary, the 1906 Act repeatedly refers to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such. . . .

Seymour v. Superintendent, at 355. And, when the Court next considered the disestablishment question some ten years later in Mattz v. Arnett, 412 U.S. 481 (1973), the absence of express language of termination once again featured prominently as the following passage from that case illustrates:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which expressly provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act [which opened up the surplus lands of the Klamath Reservation for settlement]. This being so, we are not inclined to infer an intent to terminate the reservation. . . .

Mattz v. Arnett, at 504 (emphasis in original). Thus, after Seymour and Mattz, the absence of presence of express language of termination was generally viewed as crucial to the disposition of a reservation boundary dispute. See, e.g., United States ex rel. Feather v. Erickson, 489 F.2d 99, 102 (8th Cir. 1973). And what was apparently critical to this approach was the Court's perception of the prevailing policies of the era:

> The meaning of those terms [the terms of the 1892 Act] is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388. That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservations could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.

Mattz v. Arnett, at 496 (footnote omitted).

Since Seymour and Mattz, this Court has twice more considered the effect of various surplus land acts, first in DeCoteau v. District County Court, 420 U.S. 425 (1975), and then in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The Amici believe that these two decisions represent a significant departure from the approach taken in the earlier cases. This is evident not only from the dissents entered in both cases but from a

footnote in a later decision, Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977). First, the dissenters in DeCoteau emphasized that "clear language to express termination" was not employed in the surplus land act at issue in that case. Id., 420 U.S. at 463, 466. The same argument was also pressed by the dissenters in Rosebud. Id., 430 U.S. at 618-20. Second, in Puyallup Tribe, Inc. -- a case decided shortly after Rosebud -- the Court made evident the importance it attached to the principles set forth in DeCoteau and Rosebud when it stated:

> The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion. The Ninth Circuit, relying on our decision in Mattz v. Arnett, 412 U.S. 481, held that the reservation did still exist, United States v. Washington, 496 F.2d 620 (1974), cert. denied, 419 U.S. 32. That decision predates our consideration of DeCoteau v. District County Court, 420 U.S. 425, and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

Id., 433 U.S. at 173 n.11.[5] Apparently then, the Court itself acknowledged that Rosebud and DeCoteau are considerably more expansive than the previous decisions in this context.

In Rosebud and DeCoteau, it was made clear that the focus of inquiry is on the intent of Congress, which can be variously expressed; hence, the face of the act at issue, its legislative history and surrounding

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5. The significance of footnote 11 is reinforced by the following excerpt from the dissent in that case:

> The Court tries to avoid the force of this analysis by denigrating the holding of the Court of Appeals for the Ninth Circuit. The Court states: [footnote 11 is quoted in part here]. This, to say the least, is a casual disregard of settled principles of res judicata and collateral estoppel. . . . The Court of Appeals squarely held, contrary to the contention of the State of Washington, that the [Puyallup] reservation continued to exist. . . . It is inappropriate now for the Court to denigrate the impact of that holding. . . .

Puyallup Tribe, Inc., 433 U.S. at 183 (Brennan, J., dissenting) (emphasis supplied).

circumstances must all be examined. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586-87; DeCoteau v. District County Court, 420 U.S. at 444. At the same time, the Court indicated that the use of express language is not the only method by which congressional action can result in disestablishment. Rosebud Sioux Tribe v. Kneip at 588 n.4. This expanded analysis reflects a refinement in the Court's perception of the National policies of the era involved. See Rosebud Sioux Tribe v. Kneip at 590; DeCoteau v. District County Court at 431-33. See also Montana v. United States, 450 U.S. 544, 559 n.9 (1981). As pointed out in DeCoteau:

> In 1887, the General Allotment Act (or Dawes Act) was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands. The Act empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit.

> Against this background, a series of negotiations took place in 1889 with the objective of opening the Lake Traverse Reservation to settlement. . . .

Id., 420 U.S. at 432-33 (citation and footnotes omitted).[6] What is particularly significant

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6. That the Court had refined its perspective of the General Allotment Act in DeCoteau and Rosebud is evident from the dissenting opinion filed in the latter case. There, it was pointed out that

> [t]he Court's construction of the Rosebud Acts is also untenable when the Acts are placed in historical context. Just as we held in Mattz that the statute at issue there was to be interpreted "from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388," 412 U.S. at 496, so, too, must the Rosebud Acts be construed from this perspective. As we observed in Mattz:
>
> "[The policy of the General Allotment Act] was to continue the reservation system. . . ." . . . This policy reflected Congress' attempt "to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands." DeCoteau v. District County Court, 420 U.S. at 432. Because the "familiar forces," id. at 431, at work on Congress demanded land for settlers, Congress opened the reservations. But because these forces were not overly concerned

here is that in neither DeCoteau nor Rosebud was there mention of the viewpoint espoused in Mattz that the policy of the General Allotment Act was "to continue the reservation system."[7] Indeed, the Court has since

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(cont.)

with the niceties of reservation boundaries, the reservation status of the opened areas was preserved until the trust period expired, to insure federal protection of the Indians while they were being "civilized" through contacts with white settlers. Thus, to interpret the Rosebud Acts as terminating three-fourths of the Rosebud Reservation is to set them at war with Congress' general policy towards Indians at the time the Acts were approved.

Id., 430 U.S. at 624-25.

7. While the Amici acknowledge that this aspect of Mattz was quoted favorably in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, 425 U.S. 463, 478-79 (1976), it is significant that it was done in reference to § 6 of the General Allotment Act and not § 5, the surplus lands provision of that Act. (Section 6 essentially dealt with the trust period to be established for allotments and when the patentee was to be subject to state law.) The result is that, under § 6, allotted reservations temporarily continued in reservation status. Nevertheless, the ultimate aim of the Act was the "'gradual extinction of Indian

expressly acknowledged that "[t]he policy of the [1887 Act] was the eventual assimilation of the Indian population. . . , and 'the gradual extinction of Indian reservations and Indian titles.' . . ." Montana v. United States, 450 U.S. 544, 559 n.9 (1981) (citation omitted). See also United States v. Southern Pacific Transportation Co., 543 F.2d 676, 695 (9th Cir. 1976) ("ultimate aim of the general policy of allotment was the abolition of Indian reservations. . . .")

To summarize, in DeCoteau and Rosebud, the Court adopted an approach somewhat different and more expansive than that which was used in previous decisions. It would appear then, that to the extent that the earlier cases are not in harmony with either Rosebud or DeCoteau, they should no longer be

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reservations.' . . ." Montana v. United States, 450 U.S. 544, 559 n.9 (1981), quoting Draper v. United States, 164 U.S. 240, 246 (1896).

considered useful precedent.[8] But see Lower Brule Sioux Tribe v. State of South Dakota, slip op. at 17-18; Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d at 956 n.11; Ute Indian Tribe v. State of Utah, 521 F. Supp. at 1135. So too, adherence to a court decision predating Rosebud and DeCoteau is inappropriate, where, as in this case, the surplus land act at issue is not thoroughly

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8. Conversely, the lower courts are not free to disregard the guidelines established by Rosebud and DeCoteau as the Eighth Circuit recently did in Lower Brule Sioux Tribe v. State of South Dakota, ____ F.2d ____ (8th Cir., June 27, 1983). In that case, the court stated, in obvious disregard of the approach espoused in both Rosebud at 586 and DeCoteau at 444, as follows:

> Because a clear congressional intent to disestablish cannot be found on the face of the [act at issue], the necessary intent can be found only if there is operative statutory language that is "precisely suited" to the purpose of disestablishment and this purpose is confirmed by the Act's legislative history and surrounding circumstances. . . .

Slip op. at 11, Appeal Nos. 82-1635 & 82-1636 (emphasis supplied).

analyzed anew. This is not to suggest that all cases antedating Rosebud and DeCoteau are incorrect -- they may not be. However, because those two cases have significantly changed the approach to be taken in this context, the lower courts are obligated to engage in a thorough and detailed reexamination of the subject act, following the guidelines and principles set forth in Rosebud and DeCoteau, in order to determine whether the earlier decision was, in fact, correct. See also Appawora v. Brough, 431 U.S. 901 (1977) (disestablishment case remanded for further consideration in light of Rosebud). This the lower court did not do as it rigidly adhered to the Erickson decision.

B. The Prevailing Federal Policy.

When assessing any legislation, the policies prevailing at the time of enactment can be an important consideration. As this Court has previously recognized in the Indian context, the treaties and statutes affecting Indians "cannot be interpreted in isolation

but must be read in light of the common notions of the day and the assumptions of those who drafted them. . . ." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (emphasis supplied). Accord Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979). Moreover, because the "surrounding circumstances" are to be examined whenever the disestablishment effect of a surplus land act is at issue (see, e.g., Rosebud, 430 U.S. at 587; DeCoteau, 420 U.S. at 444), the historical context in which that act was passed must obviously be considered.[9]

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9. Several courts have expressly refused to attribute any particular significance to the prevailing policies largely because of the differing results which have obtained in this context. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d at 957-58; Ute Indian Tribe v. State of Utah, 521 F. Supp. at 1150-52. While there is certainly no question that the cases regarding the disestablishment effect of surplus land acts have gone both ways, this fact should not in any way affect the role the prevailing policies ought to play here. The Amici do not claim that these policies

The prevailing federal Indian policy in the late 1880's and early 1900's was essentially twofold: assimilation of the Indian population and the reduction of existing Indian reservations. As delineated in the contemporaneous Reports of the Secretary of the Interior and the Commissioner of Indian Affairs, the policy of the federal government at that time was civilization of the Indian population, which was to be accomplished primarily by education, allotment of lands in severalty, and destruction of tribal relations. See, e.g., [1885] Report of the Secretary of the Interior at 25-28; [1886] Report of the Secretary of the Interior at 4; [1888] Report of the

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(cont.)
alone are dispositive of the issue presented. Instead, the purpose of this discussion is simply to establish the historical setting in which these various acts were passed -- a matter which, as discussed earlier, should have a bearing in interpreting the 1908 surplus land act at issue. See also Montana v. United States, 450 U.S. at 559 nn.8 and 9.

Secretary of the Interior at XXIX-XXXII; [1889] Report of the Commissioner of Indian Affairs at 3-4; [1890] Report of the Commissioner of Indian Affairs at VI, XXXIX; [1891] Report of the Commissioner of Indian Affairs at 3-9, 26; [1892] Report of the Commissioner of Indian Affairs at 5; [1894] Report of the Secretary of the Interior at IV. See generally Montana v. United States, 450 U.S. at 559-60 n.9. At the same time, it was the unquestioned policy of the federal government to reduce the existing Indian reservations in order to make the surplus lands -- that is, the lands not needed by the Indians themselves -- available for non-Indian settlement.[10] See, e.g., XVII Cong. Rec. 2271 (remarks of Rep. Perkins), 2306 (remarks of

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10. Thus, as stated in H.R. Rep. No. 791, 50th Cong., 1st Sess. (1888), "[t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . ." Id. at 3.

Rep. Weaver), 2310 (remarks of Rep. Cutcheon) (1886); H.R. Rep. No. 791, 50th Cong., 1st Sess. 3 (1888); XXVI Cong. Rec. 6236 (remarks of Rep. Coffen), 7689 (excerpts from Report on North American Indians) (1894). The contemporaneous Reports of the Secretary of the Interior and the Commissioner of Indian Affairs are replete with references to this policy.[11] See, e.g., [1885] Report of the Secretary of the Interior at 25-26; [1888] Report of the Secretary of the Interior at XXXIV; [1889] Report of the Commissioner of Indian Affairs at 3-4 and 112; [1890] Report of the Secretary of the Interior at XXIII-XXIV; [1890] Report of the Commissioner of Indian Affairs at VI and XXXVIII-XXXIX; [1891] Report of the Commissioner of Indian Affairs at 8 and 44-47; [1892] Report of the Secretary

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11. It is significant that in a recent Opinion of the Solicitor, 84 I.D. 1 (1977), it was recognized that the prevailing federal policy at this time was, in part, "to reduce the size of Indian reservations. . . ." Id., 84 I.D. at 9.

of the Interior at VII-VIII and XXXIII; [1892] Report of the Commissioner of Indian Affairs at 5 and 74. The following excerpt from the 1891 Report of the Commissioner succinctly sets forth the underlying basis for pursuing a policy of reducing the existing reservations:

> While perhaps it is possible to push such work too rapidly, I do not hesitate to say that the ultimate destruction of the entire system of reservations is inevitable. There is no place for it in our present condition of life, and it must go. The millions of acres of Indian land now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization. They should be protected in the permanent possession of all this land necessary for their own support, and whatever is taken from them should be paid for at its full market value. But it cannot be expected under any circumstances that these reservations can remain intact, hindering the progress of civilization. . . . The Indians themselves are not slow to appreciate the force of the logic of events, and are becoming more and more ready to listen to propositions for the reduction of the

reservations and the extinguishment of their title to such portions of the land as are not required for their own use.

Id. at 46 (emphasis supplied).[12]

Firmly entrenched as national policy by

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12. Earlier in the same Report, the Commissioner advocated that this policy be carried out with dispatch:

> Now that there is coming to be a pretty well recognized and rational policy, it should be carried into execution with as much vigor as is practicable, to the end that the results anticipated from it may be reached as speedily as possible.
>
> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction to the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away.

Id. at 8 (emphasis supplied).

the early 1900's, these policies remained in effect through much of the first two decades of the 1900's. See, e.g., [1906] Report of the Commissioner of Indian Affairs at 81-82 wherein the Commissioner stated:

> I am convinced that a wise provision in any general allotment act would be to allow not less than 5 or more than 40 acres of irrigable land, or not more than 640 acres of grazing land, to each Indian, in the discretion of the Secretary of the Interior. This would better meet existing conditions and enable the Department to care properly for the interests of all concerned. Another result which could hardly help flowing from it would be the more rapid opening of reservations and the consequent dissolution of the generally condemned reservation system; for the executive branch of the Government could act then in one case after another without the need of consuming the time of the Congress upon special legislation. The development of what has been known as the frontier West would thus proceed along the line of least resistance, for the ultimate advantage of our whole country.

Id. (emphasis supplied). As pointed out in an earlier boundary decision of the Eighth Circuit, Rosebud Sioux Tribe v. Kneip, 521

F.2d 87 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977), in this regard:

> The land was being thrown open for farming. The settlers were emigrating in great numbers to the new land in the West, buying their farms and planting their crops. The Indian reservations were being eroded, not preserved. . . .

Id. at 102 (emphasis supplied). Accord Hollister v. United States, 145 F. 773, 777 (8th Cir. 1906) ("tribal reservations under the act of 1887 were fast being disintegrated. . . .")

Since the prevailing national policy was, in part, to reduce the existing Indian reservations, it becomes apparent that the surplus land provisions of the 1887 General Allotment Act (24 Stat. 388)[13] -- the seminal legislation of this era (see Montana v. United

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13. Section 1 of the General Allotment Act guaranteed that individual members of the Tribe would receive a prescribed amount of reservation land in the form of allotments, while Section 5 of that Act made provision for the eventual disposal of the unallotted or "surplus" lands of the then existing reservations.

States, 450 U.S. at 559 n.8; n.14 infra) -- were not, as apparently suggested in Mattz, 412 U.S. at 496, intended by Congress to continue the reservation system. On the contrary, it would appear that the Act was passed to reconcile the dual policies of civilization and reduction of existing reservations.[14] See, e.g., United States v.

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14. Thus, in a letter to Congress dated March 10, 1892 reproduced in S. Rep. No. 57, 53d Cong., 1st Sess. at 2-5 (1893), the Commissioner of Indian Affairs stated as follows:

> The policy of the Government, rendered fixed and definite by the passage of the severalty law in 1887, had for its object the twofold purpose of allotting lands in severalty, with the view of stimulating the individuality of the Indians and promoting their personal prosperity, and also of rendering available for white settlement vast areas of surplus lands not needed by the Indians. Indian lands restored to the public domain and thrown open to white settlement under the homestead law become taxable on the completion of the title. . . .

S. Rep. No. 57, at 3. To this end, it was thought by advocates of the prevailing policy that the enactment of surplus land statutes would be beneficial to both the

Southern Pacific Transportation Co., 543 F.2d 676, 694-95 (9th Cir. 1976); Hollister v. United States, 145 F. at 776-77. See also DeCoteau v. District County Court, 420 U.S. at 432.

(cont.)
individual allottees of the reservations affected and the United States: first, the land would be settled by non-Indians who would expose the allottees to the ways of civilization, thereby facilitating the policy of assimilation; second, it was thought that the sale of surplus land would serve as a means of support for the allottees until they were fully capable of assuming the responsibilities of citizenship; and third, vast tracts of land could, at the same time, be made available for settlement to meet the demands of the Nation's westward expansion. See, e.g., H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888); [1890] Report of the Commissioner of Indian Affairs at XXXVII-XL; [1891] Report of the Secretary of the Interior at VI; [1892] Report of the Secretary of the Interior at VII and XXXIII. And, as intended, with the passage of the General Allotment Act, the opening of reservation lands occurred at a much more rapid pace than previously. See, e.g., [1891] Report of the Secretary of the Interior at VI; [1892] Report of the Secretary of the Interior at VII and XXXIII.

In summary, the enactment of surplus land legislation in the late 1800's and early 1900's was part and parcel of the prevailing federal policy of reducing existing Indian reservations. It follows then, that the commonly held assumption at this time must have been that with the opening of these areas to entry and settlement, the reservation status of the lands involved was to end. See, e.g., Hollister v. United States, 145 F. at 777. And, as Oliphant, 435 U.S. at 206, establishes, these are the policies and assumptions which should inform the Court's decision here.

C. The Significance of Public Domain Language

Because the 1908 Act at issue employs public domain language (§ 9, 35 Stat., at

464),[15] its significance bears amplification here. This is of particular concern to the Utah Counties as there is a dispute in their boundary case over whether such language has any significance in this context at all. See, e.g., Reply Brief of the Ute Tribe at 8-21, 26-27, Ute Indian Tribe v. State of Utah, et al., Appeal Nos. 81-1827 and 81-1901 (10th Cir.). A review of the applicable authorities shows that the use of such language, particularly by Congress, is an important -- if not controlling -- factor in the disestablishment analysis.

The courts have, in cases involving reservation boundary disputes, consistently

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15. Section 9 provided that that Indians residing in certain townships in the opened portion of the reservation retained a right to take timber in those townships for domestic purposes "only as long as the lands remain part of the public domain." 35 Stat., at 464. By so providing, it is evident that Congress understood and intended that the opened lands were to be restored to the public domain.

recognized that restoration to the public domain language is synonymous with disestablishment. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 589 & n.5; DeCoteau v. District County Court, 420 U.S. at 446; Mattz v. Arnett, 412 U.S. at 504 n.22; Seymour v. Superintendent, 368 U.S. at 354-55; Russ v. Wilkins, 624 F.2d 914, 915 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transportation Co., 543 F.2d at 696; United States ex rel. Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); United States ex rel. Feather v. Erickson, 489 F.2d at 100; United States ex rel. Condon v. Erickson, 478 F.2d at 688; Beardslee v. United States, 387 F.2d 280, 285 (8th Cir. 1967) (Blackmun, J.); Ellis v. Page, 351 F.2d 250, 251-52 (10th Cir. 1965); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1005 (D. Minn. 1971). See also United States v. Pelican, 232 U.S. 442, 445-46 (1914). The

Court's most recent pronouncement in this context, Rosebud Sioux Tribe v. Kneip, is a telling example that there can be no real argument over the significance of public domain language. Thus, while there was substantial disagreement over the outcome in that case, there was obvious agreement that restoration to the public domain language is, by itself, express language of disestablishment. Compare Rosebud Sioux Tribe v. Kneip, 430 U.S. at 589 & n.5 with id. at 618 (Marshall, J., dissenting). Moreover, the congressional and administrative materials from the era in question show that Congress and the Department of the Interior shared this understanding as to the significance of public domain language. See, e.g., H.R. Rep. No. 791, 50th Cong., 1st Sess. 3 (1888); H.R. Rep. No. 2967, 51st Cong., 1st Sess. (1890) at 1-2 (1890 Letter of the Secretary of the Interior), 2-3 (1890 Letter of the Commissioner of Indian Affairs); H.R. Rep. No.

3305, 51st Cong., 2d Sess. 1-2 (1890); [1890] Report of the Secretary of the Interior at XXIV; [1890] Report of the Commissioner of Indian Affairs at XXXVIII-XXXIX; [1891] Report of the Commissioner of Indian Affairs at 44; [1892] Report of the Secretary of the Interior at VII-VIII.

As the case law pertaining to the public lands and the public domain reveals, the rationale for this shared understanding is simple. It has long been settled law in this country that when a tract is lawfully appropriated or reserved for any purpose by the federal government, that tract loses its character as public lands, i.e., it is no longer a part of the public domain. See, e.g., Wilcox v. Jackson, 13 Pet. 498, 513 (1839); Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733, 745 (1875); Beecher v. Wetherby, 95 U.S. 517, 524 (1877); Missouri, Kansas, and Texas Railroad Co. v. Roberts, 152 U.S. 114, 118-19 (1894); Spalding

v. Chandler, 160 U.S. 394, 404-05 (1896); Scott v. Carew, 196 U.S. 100, 109-11 (1905). And, as has been repeatedly recognized, this rule is of particular force in regard to Indian reservations. See, e.g., Leavenworth, Lawrence, and Galveston Railroad Co., at 745; Missouri, Kansas and Texas Railroad Co. v. Roberts, at 119; Spalding v. Chandler, at 404-05. Hence the significance of restoration to public domain language to the disestablishment analysis is readily explainable: Because the reservation of a tract removes it from the public domain, the subsequent restoration thereof to the public domain (or its equivalent) signifies the termination of the reserved status of that land. It is evident then, that reservation status and public domain status are plainly incompatible and, therefore, restoration to public domain language and the like are of obvious significance in this context.

The preceding discussion establishes that it has always been the shared assumption of the courts, Congress, and the Department of the Interior that lands are not considered a part of the public domain if they are located within the boundaries of an existing Indian reservation. It follows then that when Congress used restoration to public domain language in opening reservation areas for entry and settlement, as it did in the 1908 Act, the intent was to terminate the reserved status of the area affected. Similarly, when either the courts or officials of the Department of the Interior treated such reservation areas as having been restored to the public domain, it was understood that the area affected had been disestablished.[16]

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16. It should be mentioned that there is some authority for the proposition that limitations upon the manner of entry, such as that contained in the 1908 Act (§ 2, 35 Stat., at 461-62), can negate restoration to public domain language. See Ute Indian Tribe v. State of Utah,

D. Subsequent Administrative and Legislative Treatment: Past-Tense and Related References

The significance to be attributed the subsequent jurisdictional history of the lands

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(cont.)
521 F. Supp. at 1122-23. As the previously cited authorities suggest, however, the imposition of such limitations is not, without more, indicative of a congressional intent to abandon the purpose of disestablishment underlying the use of public domain language. In this regard, it is particularly noteworthy that at least three separate surplus land acts which contain restoration to public domain language, or its equivalent, have contained similar limitations. See Act of July 4, 1884, 23 Stat. 76, 80 (Columbia Reservation Act); Act of March 3, 1873, § 1, 17 Stat. 633 (Round Valley Act); Act of March 2, 1889, § 21, 25 Stat. 888, 896 (Great Sioux Nation Act). Nevertheless, the historic reservation areas affected by these acts have been consistently treated as having been thereby disestablished. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. at 589 and n.5 (1889 Act terminated reservation status of the restored area); Starr v. Long Jim, 227 U.S. 613, 619 (1913) (Columbia Reservation); Russ v. Wilkins, 624 F.2d at 915 (1873 Round Valley Act made a major change in the reservation). Thus, it is reasonable to conclude that the mere presence of limitations on the manner of entry has little, if any, bearing in this context.

at issue is a matter which was discussed at length by the Court in Rosebud, 430 U.S. at 603-05 and DeCoteau, 420 U.S. at 442, and needs no further amplification here. Subsequent administrative and legislative treatment otherwise has had a more checkered history in the disestablishment context. Several observations in regard to the record of that subsequent treatment present in the instant case are, therefore, appropriate.

It is, of course, well recognized that both a contemporaneous interpretation and a consistent, long-standing interpretation of a particular statute by the governmental agency and its officials responsible for administering that statute is entitled to great deference by the courts. See, e.g., United States v. National Association of Securities Dealers, Inc., 422 U.S. 694, 718-19 (1975) (consistent, long-standing administrative interpretation); Zuber v. Allen, 396 U.S. 168, 192 (1969) (contemporaneous administrative

construction); Russ v. Wilkins, 624 F.2d at 922-23. Disagreement as to the application of these principles in boundary litigation has most often arisen in regard to the significance to be attributed past-tense and like references. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d at 959-60; City of New Town v. United States, 454 F.2d at 125-26; Ute Indian Tribe v. State of Utah, 521 F. Supp. at 1132-35, 1141-42 & nn. 189 & 191. In this regard, there is no question that as a general proposition these past-tense and related references are not without consequence, but can accurately reflect the current status of the area involved and hence, the intent of Congress.[17] See, e.g., Rosebud

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17. A number of historical administrative documents refer to the opened lands as "ceded". See App. B, Appendix to the Brief of the Amici Counties, Bartlett v. Solem, No. 82-1582 (8th Cir.) (a copy of which has been lodged with the Court). In Ute Indian Tribe v. State of Utah, the court held that "ceded" references

Sioux Tribe v. Kneip, 430 U.S. at 603 n.25, 609 n.38; Russ v. Wilkins, 624 F.2d at 925; United States v. Southern Pacific Transportation Co., 543 F.2d, at 696; Rosebud Sioux Tribe v. Kneip, 521 F.2d at 102 & n.54, 107 n.88, 110 & n.114, 113 n.134. It follows then, that the determination of the weight to

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(cont.)
contained in the record in that case were without significance because, as in the instant case, there had not been an actual cession. Id., 521 F. Supp. at 1118. On the contrary, the Amici submit that these references are a valid indicator of perceived disestablishment in this context. It is settled law that words of cession are "precisely suited" to disestablishment, even where the term is "technically misused." DeCoteau v. District County Court, 420 U.S. at 445; Rosebud Sioux Tribe v. Kneip, 430 U.S. at 597, 613. Thus, although the portion of the reservation opened under the 1908 Act was not technically ceded, the use of that term is nevertheless evidence of an understanding that the opened lands had been disestablished. See, e.g., Rosebud Sioux Tribe v. Kneip at 597-98. It follows then, that although these references are technically incorrect, the courts are not free to ignore the significance underlying their usage. See also United States ex rel. Cook v. Parkinson, 525 F.2d at 123; Rosebud Sioux Tribe v. Kneip, 521 F.2d at 112.

be accorded such subsequent treatment should be made on the basis of the actual record of that treatment and not on any vague notions as to the value or reliability of such references generally. And where, as in this case, the past-tense and like references show that the prevailing perception for many years was that the area in question had been disestablished, those references are entitled to considerable deference. Cf. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 604-05 n.27 (no "consistent" or "dominant" approach in administrative materials); DeCoteau v. District County Court, 420 U.S. at 442 n.27 ("No consistent pattern emerges" in administrative documentation.).

Two separate but related arguments are usually made to negate the significance of the past-tense references. Specifically, it is often claimed: that these references are inadvertent or mistaken; and that they are confused because the same or contemporaneous

documentation also contains "present-tense" references to the historic reservation area involved. Compare DeCoteau v. District County Court, 420 U.S. at 442 n.27. In view of the extensive and repeated past-tense and like references contained in the historical record, however, neither of these claims can be considered persuasive. First of all, because there are numerous past-tense and like references, it can hardly be said that the references are either inadvertent or mistaken. On the contrary, their repeated use makes it quite apparent that such references had significance for their authors. Nor can it be said that these references are without import because some of the documents also contained so-called "present-tense" references. That is, by no means are these "present-tense" references indicative of confusion on the part of the authors. On the contrary, when read together -- as the various

references should be,[18] it becomes apparent that because the past-tense references were consistently and repeatedly used over a long period of time, often by the same author (see App. B, Appendix to Court of Appeals Brief of the Amici Counties cited at n.17, supra), the "present-tense" references were most likely just convenient, shorthand methods of designating the area being discussed and no more. In these circumstances then, it can be safely concluded that the so-called "present-tense" references were, in the words of this Court, "used in a geographical and not a legal sense. . . ." United States v. Oklahoma Gas & Electric Co., 318 U.S. 206, 216 (1943). In our view, this interpretation is considerably more satisfactory, at least where, as in this case, there are numerous past-tense and like

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18. And, doing so makes good sense since these references are often used in the same document or by the same author in a series of documents. See, e.g., App. B, Appendix to Court of Appeals Brief of the Amici Counties cited at n.17, supra.

references than to conclude that the responsible officials -- which includes the Secretary of the Interior and the Commissioner of Indian Affairs -- were in utter confusion and continually vacillated between perceptions of the status of the area.

E. Restoration of the Undisposed of Surplus Lands Under the 1934 Indian Reorganization Act

In a series of published orders, the Secretary of the Interior restored the undisposed of lands opened to entry under the 1908 Act to tribal ownership under the authority of § 3 of the Indian Reorganization Act (48 Stat. 984, 25 U.S.C. § 463). See 1 Fed. Reg. 1738 (Standing Rock); 6 Fed. Reg. 3300, amended 14 Fed. Reg. 471 (Cheyenne River); 17 Fed. Reg. 1065 (same); 22 Fed. Reg. 3693 (same); & 32 Fed. Reg. 14276 (same). From 1935 through the early 1970's, orders of this sort were issued. For example, there were orders of restoration involving the undisposed of surplus lands of the original Rosebud Indian

Reservation (3 Fed. Reg. 399), the historic Uintah Reservation (10 Fed. Reg. 12409), the original Fort Berthold Reservation (3 Fed. Reg. 1860, 13 Fed. Reg. 2416, & 26 Fed. Reg. 323); and the historic Flathead Reservation (e.g., 1 Fed. Reg. 666, 3 Fed. Reg. 5, 21 Fed. Reg. 6681, 23 Fed. Reg. 3854, 26 Fed. Reg. 4015, & 29 Fed. Reg. 16827). The Amici submit that the Cheyenne River and Standing Rock restoration orders are solid evidence of a long-standing understanding of perceived disestablishment, and accordingly, entitled to particular deference as such.

Section 3 of the Indian Reorganization Act authorizes the Secretary of the Interior, in certain circumstances, to restore to tribal ownership the undisposed of surplus lands of any Indian reservation previously opened to entry and settlement. In implementing this provision, the Department of the Interior has officially determined that it "applies both to lands which are part of an existing

reservation and to lands which were part of a reservation at the time the land was opened for sale. . . ." Russ v. Wilkins, 624 F.2d at 924 n.25. Thus, as this Court acknowledged in Rosebud, the fact that undisposed of lands in the area at issue were restored to tribal ownership under § 3 of that Act is not indicative, one way or another, of the Department's view as to the reservation status of that area. Id., 430 U.S. at 604 n.27. Nevertheless, these orders are, for a different reason, of consequence in boundary disputes.

In each of the orders of restoration involving lands opened pursuant to the 1908 Act at issue here, it was expressly provided that pursuant to the authority of § 7 of the 1934 Act (25 U.S.C. § 467), the restored lands were also to be "added to and made a part of

the existing reservation. . . ."[19] See 1 Fed. Reg. 1738-39; 6 Fed. Reg. 3300, as amended 14 Fed. Reg. 471; 17 Fed. Reg. 1065; 22 Fed. Reg. 3693; & 32 Fed. Reg. 14276. Section 7 authorizes the Secretary of the Interior, in his discretion, to "add" lands acquired pursuant to any provisions of the Act "to existing reservations," or where no reservation exists, to be proclaimed a "new" reservation. 48 Stat., at 985. If, in fact, the restored lands were already considered to be in reservation status, there would have been no need to expressly restore those lands to reservation status under the authority of § 7. And, in view of the fact that § 7 has often been used by the Secretary of the

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19. Section 7 proclamations are also contained in the Rosebud, Ute, Flathead, and Fort Berthold Restoration Orders cited above.

Interior independently of § 3 restorations[20] (see, e.g., 9 Fed. Reg. 14019; 46 Fed. Reg. 1040, 26562-563, 46407, 46681, & 47116-117; 47 Fed. Reg. 15162, 23812, 23813, 26243, & 31753), and the fact that the various § 7 orders carefully specify whether the declaration involves the addition to an existing reservation or creation of a new reservation (compare, e.g., 6 Fed. Reg. 3300, 10 Fed. Reg. 12409, and 46 Fed. Reg. 46407 with, e.g., 9 Fed. Reg. 14907-909, 46 Fed. Reg. 46681, and 47 Fed. Reg. 26243), it is likely that the Secretary did not lightly or needlessly employ § 7 in the restoration orders involved in this case. Thus, as the Rosebud restoration order (3 Fed. Reg. 399) attests, these orders faithfully and accurately reflect the perceived status of the area involved. It

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20. Conversely, from time to time, § 3 has been used alone. See, e.g., 3 Fed. Reg. 567-68; 3 Fed. Reg. 2223; 28 Fed. Reg. 3655-56; 35 Fed. Reg. 10601; 35 Fed. Reg. 12962; & 36 Fed. Reg. 17450.

is therefore evident that since these § 7declarations were not mere surplusage, the orders of restoration are strong evidence of perceived disestablishment here. See also United States v. Southern Pacific Transportation Co., 543 F.2d at 696 (congressional restoration of lands in question originally proposed by the Secretary of the Interior given weight).

F. Continued Federal Presence in the Area

Since the opening of the area at issue in 1910, the federal government has continued to have significant responsibilities in that area. This is largely the product of the trust status of allotments, tribal lands, and -- in earlier years -- unsold surplus lands (see generally Ash Sheep Co. v. United States, 252 U.S. 159, 164-66 (1920); United States v. Pelican, 232 U.S. at 447-50), and of the long-established guardian/ward relationship between the federal government and Indians. As a result, continued federal presence in

most opened areas has not only been assured, but has come to be expected. At the same time, though, this continued presence should not, by itself, have any bearing on the question of disestablishment of the non-Indian owned areas at issue here. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 615-16 n.48; DeCoteau v. District County Court, 420 U.S. at 442-43. As Rosebud and DeCoteau attest, there will often be continued federal presence in former reservation areas.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the Eighth Circuit be reversed.

Dated this 4th day of August, 1983.

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